

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2014-_____-S

IN RE:)	
)	
Village Overlook Condominium)	COMPLAINT FOR RELIEF
Association, Petitioner,)	AGAINST IMPROPER CHARGES AND
)	REQUEST FOR DECLARATORY RULING
v.)	
)	
JACABB Utilities, LLC, Respondent)	

Village Overlook Condominium Association (“VOCA”) hereby complains against JACABB Utilities LLC (“JACABB”), pursuant to S.C. Code Ann., §58-5-270, 58-5-290 and S.C. Reg. 103-824, for relief against unlawful sewer availability fee charges and petitions the South Carolina Public Service Commission (“Commission”) for a declaratory ruling, pursuant to the Commission’s inherent power, S.C. Code Ann., §58-5-290, S.C. Reg. 103-824, 103-825, and otherwise, that JACABB has no right to charge VOCA these sewer availability fees, JACABB must cease charging VOCA these sewer availability fees going forward, and VOCA has no liability or obligation to pay sewer availability fees JACABB has billed to VOCA through the date of the Commission’s ruling.

VOCA is entitled to the requested relief for the following reasons:

- a. The sewer availability fees JACABB is charging VOCA are improper under S.C. Code Ann., §58-5-290 because they are unjust, unreasonable, noncompensatory, and/or discriminatory.
- b. JACABB is not authorized in its Commission-approved tariff (**Exhibit 2**) to charge a sewer availability fee;
- c. JACABB has failed to obtain Commission approval of the VOCA Sewer Agreement through which JACABB asserts it has a right to charge VOCA sewer availability fees;
- d. The VOCA Sewer Agreement is unenforceable because it is based upon JACABB's material misrepresentation that JACABB had "legally established" the Agreement's sewer availability fees and JACABB had those fees "on file with the South Carolina Public Service Commission";
- e. The VOCA Sewer Agreement is unenforceable because of impossibility of performance and frustration of purpose because VOCA cannot now and has never been able to utilize the availability of sewer service for the 40 undeveloped condominiums.; and
- f. JACABB is not providing VOCA with the sewer availability service at issue because VOCA does not own, and has never owned, the Undeveloped Condominium Property, and does not want, and cannot use the sewer availability service;

HISTORY OF VILLAGE OVERLOOK CONDOMINIUMS

1. James Anthony began to develop The Cliffs at Mountain Park (“The Cliffs”) around 2007 (hereinafter, Anthony, The Cliffs at Mountain Park, LLC, and all Cliffs development entities collectively referred to as “Anthony”). As part of The Cliffs, Anthony planned to develop Village Overlook Condominiums. Anthony planned the Village Overlook Condominiums as fifteen (15) separate buildings, housing four (4) condominiums each, constructed contiguously on a single tract of land – a total of sixty (60) individual condominium units.

2. Around December 9, 2008, before Anthony had constructed or sold any of the Village Overlook condominiums, he incorporated VOCA. VOCA was and is a property owner’s association whose members are the twenty (20) owners of the Village Overlook Condominiums. VOCA’s operations are governed by its by-laws. From VOCA’s creation until around February 11, 2014, Anthony ran VOCA, not pursuant to its by-laws, but as if VOCA were a part of The Cliff’s development.

3. From early 2009 through around September 2010 Anthony constructed the five (5) condominium buildings. These condominiums appear on the aerial photograph attached as **Exhibit 1**. Each building houses four (4) condominiums. Individuals began purchasing the Village Overlook condominiums around December 2009 and by January 2011 all 20 units were sold.

4. Anthony never built any condominiums on the undeveloped property outlined on **Exhibit 1** in yellow (the “Undeveloped Condominium Property”). This property remains undeveloped today.

5. Around February 2012 Anthony declared bankruptcy and around June 2012 the Undeveloped Condominium Property was purchased in a foreclosure sale by a company named William Marcus and Associates.

6. Anthony continued to run VOCA after the condominiums were purchased and into 2013. Neither Anthony nor JACABB disclosed the VOCA Sewer Agreement or the Cliff's Sewer Agreement to new Village Overlook condominium owners. VOCA's members learned of the VOCA Sewer Agreement for the first time around June 2013.

REGULATORY AND LEGAL REASONS JACABB CANNOT LAWFULLY CHARGE VOCA THE SEWER AVAILABILITY FEES AT ISSUE

7. Around March 2005, JACABB began providing sewer service in South Carolina by purchasing the assets of Cox Utilities. JACABB and Cox jointly petitioned the Commission to approve the purchase and issue JACABB a certificate of public convenience and necessity to provide sewer service to Cox's customers in the Forest Hills subdivision in Anderson County under the rates the Commission had approved for Cox in Docket No. 2003-277-S, Order No. 2004-101. On October 31, 2005, the Commission approved JACABB's petition and JACABB began providing sewer service to Cox's former customers under the tariffed rates the Commission had approved for Cox, a copy of which is attached as **Exhibit 2**.

8. On June 13, 2008, the Commission issued Order No. 2008-422 in Docket No. 2003-277-S authorizing JACABB to begin charging the "Phase 2" rates reflected on JACABB's tariff attached **Exhibit 2**. These are still JACABB's tariffed rates today. These Phase 2 rates only allow JACABB to charge a monthly sewer service rate of \$53.16, and ***do not authorize JACABB to charge a sewer availability fee or any other similar charge.***

9. Around March 3, 2009 Jacabb entered into a sewer service agreement with Anthony (the “Cliff’s Sewer Agreement”). Around April 24, 2009 Jacabb entered into a Sewer Service Agreement that, in its face, purports to be with VOCA (the “VOCA Sewer Agreement”). VOCA had no operations or members at that time because the Village Overlook Condominiums had not been constructed or sold, and Anthony was still running VOCA as a part of The Cliff’s development. Kristopher Clark signed the VOCA Sewer Agreement on behalf of VOCA. VOCA is informed Clark at that time was an employee of Anthony and not an employee of VOCA. VOCA is informed ***Clark failed to satisfy the corporate requirements necessary to bind VOCA to the VOCA Sewer Agreement and lacked the authority to sign the agreement on behalf of VOCA.***

10. Around June 2009 Jacabb applied to the Commission for approval of the Cliff’s Sewer Agreement and the Commission assigned that matter Docket No. 2009-238-S.

11. At the time of JACABB’s June 2009 application for approval of the Cliff’s Sewer Agreement, Anthony had not completed or sold any Village Overlook Condominiums. As a consequence, VOCA had no operations and no members during that approval proceeding and effectively did not exist as an entity. VOCA’s members, who are JACABB’s current customers, had no knowledge of the unapproved VOCA Sewer Agreement until June 2013 and no input or knowledge of the proceeding that approved the Cliff’s Sewer Agreement.

12. While JACABB’s June 2009 Application attached the VOCA Sewer Agreement as Exhibit B, it did that presumably for informational purposes, as ***JACABB did not request approval of the VOCA Sewer Agreement.***

13. The Commission approved the Cliff’s Sewer Agreement in August 2009 without a hearing in Order No. 2009-518 (Order attached as **Exhibit 3**) through the following ruling:

We find that public convenience and necessity will be served by approval of the contract between Jacabb Utilities, LLC and The Cliffs at Mountain Park, LLC. We therefore approve the application and the contract as filed.

14. The Commission did not approve the VOCA Sewer Agreement because JACABB did not request its approval. ***JACABB has therefore failed to seek or receive Commission approval of the contract JACABB claims allows it to charge VOCA the sewer availability fees.¹***

15. Paragraph 3.1 of the VOCA Sewer Agreement sets forth an agreement through which VOCA will purportedly pay a monthly “availability fee in the amount of \$53.16 per month per residential unit ...until the residential unit is sold,” at which time the sewer availability fee would convert to a sewer service fee “which is also fifty-three and 16/100 dollars (\$53.16) per month.”

In this same paragraph 3.1, JACABB represented and warranted:

the rates and charges applicable so such services, as legally established, are on file with the South Carolina Public Service Commission and are in accordance with the rules and regulations of the South Carolina Public Service Commission.

JACABB’s representation was the foundation for the availability fees in the VOCA Sewer Agreement - and JACABB’s representation was absolutely false. Contrary to JACABB’s representation, the Commission had not authorized JACABB to charge a sewer availability fee. It had only authorized JACABB to charge the \$53.16 *sewer service* fee, as shown on the tariff and Order attached as **Exhibits 2 and 3**.

16. A sewer availability fee is not part of JACABB’s tariffed rates. JACABB has never lawfully established its claimed sewer availability fee. JACABB has never obtained an order from the Commission even mentioning the claimed sewer availability fee, much less

¹ Around August 18, 2014, JACABB requested the Commission approve an April 13, 2011 Amendment Number One to the Cliff’s Sewer Agreement and VOCA Sewer Agreement. VOCA has intervened in that filing and, because of its direct relationship to the matters set forth herein, requested a stay of that proceeding pending the Commission’s ruling on this Complaint.

finding the fee is reasonable or necessary. *The VOCA Sewer Agreement is therefore unenforceable because it is based upon JACABB's material and false representation in the VOCA Sewer Agreement that the sewer availability fee was legally established.*

17. Utilities charge a sewer availability fee in South Carolina in exchange for making sewer service readily available to a property owner for the property owner's undeveloped lot or property.

18. Anthony negotiated the Cliff's Sewer Agreement with JACABB to allow Anthony to develop the Village Overlook Condominiums on the undeveloped property he owned. As Anthony constructed and sold condominium units, each unit would begin receiving sewer service and VOCA would begin paying JACABB its tariffed \$53.16 sewer service fee for that sold unit.

19. VOCA has learned JACABB initially billed an undivided \$3,189.60 per month for what JACABB identified as "Sewer" service, as shown on the October 30, 2012 Invoice attached as **Exhibit 4**. This amount equals 60 (the number of condominium units Anthony initially planned) times \$53.16. For these invoices, VOCA always paid \$1,063.20 (20 x \$53.16) and, while Anthony was solvent, VOCA is informed Anthony paid the remaining \$2,126.40 (40 x \$53.16). JACABB knew this because VOCA is informed JACABB always received separate checks each month, one from Anthony, and one from VOCA. VOCA is informed Anthony made the last sewer availability fee payment to JACABB related to the Village Overlook condominiums around March 2013.

20. On August 27, 2013 JACABB began sending VOCA two separate invoices, one for \$2,126.40 "VOCA Sewer Availability" and the other for \$1,063.20 "MP VOCA Sewer Residential." Copies of the August 2013 invoices are attached as **Exhibit 5**.

21. JACABB's latest invoices to VOCA are dated August 28, 2014 and are attached as **Exhibit 6**. The invoice for MP VOCA Sewer Residential is current. JACABB's invoice for VOCA Sewer Availability claims an outstanding balance due of \$40,827.89.

22. JACABB is therefore charging each of the 20 Village Overlook condominiums JACABB's tariffed \$53.16 per month sewer rate. In sharp contrast, JACABB is effectively charging each of these 20 residential units an additional sewer availability fee of *twice* that sewer rate, or \$106.32 per month. JACABB is presumably charging these sewer availability fees because JACABB has sewer service immediately available for Anthony's forty (40) unbuilt condominiums², on property VOCA does not own and cannot develop.

23. JACABB was therefore, in reality, making sewer service available for Anthony while Anthony owned the Undeveloped Condominium Property and is now making sewer service available for William Marcus and Associates, the current owner of the Undeveloped Condominium Property.

24. VOCA has been told Anthony installed sewer collection piping on the Undeveloped Condominium Property during initial development. If that is true, this unused sewer collection system is located on property owned by William Marcus and Associates and not VOCA.

25. VOCA has never owned any property on which condominiums could be developed. It has never owned the Undeveloped Condominium Property and does not own it now. It is therefore impossible for JACABB to provide VOCA, or for VOCA to accept, additional sewer availability, because VOCA cannot avail itself of that service and does not want

² In fact, JACABB lacks the current capacity to serve the 40 unbuilt units for which JACABB is charging VOCA. JACABB's treatment plant is only approved by DHEC to serve 60 condominium units (18,000 gallons per day). *JACABB also serves at least three commercial customers on this system.* JACABB therefore only retains capacity to serve a fraction of the 40 unbuilt condominium units for which it is billing VOCA as "available."

that service. *The VOCA Sewer Agreement, particularly as it relates to sewer availability fees, is therefore void because it is impossible to perform and its purpose is frustrated.*

26. *JACABB cannot and is not providing this utility service to VOCA in exchange for sewer availability fees* but is, instead, providing this availability service to the past and current developers/owners of the Undeveloped Condominium Property, Anthony and William Marcus and Associates.

27. For all of these reasons, it is also clear *the sewer availability fees JACABB is charging VOCA are improper under S.C. Code Ann., §58-5-290 because they are unjust, unreasonable, noncompensatory, and/or discriminatory.*

28. The Commission should therefore prohibit JACABB from charging sewer availability fees to VOCA going forward and rule that VOCA owes JACABB nothing for sewer availability fees JACABB has previously charged.

29. JACABB's unlawful action, in charging VOCA sewer availability fees, is causing VOCA and its members direct, serious, and immediate damage, as follows.

- a. JACABB's unlawful charges have made the twenty (20) Village Overlook Condominiums virtually unmarketable. VOCA's members must disclose to prospective purchasers VOCA's dispute with JACABB, including JACABB's claim that VOCA owes JACABB more than \$40,000 in past-due availability fees, interest on the past due amount at an annual rate of 18%, plus a monthly availability fee charge of \$2,126.40 going forward (an amount that is *twice* what VOCA's members are currently paying to actually receive sewer service).

- b. JACABB's unlawful actions have forced and are forcing VOCA to expend their limited member resources on the costs and attorney fees and VOCA member time necessary to pursue this relief with the Commission.

30. VOCA therefore requests that the Commission expedite its review of this Compliant and issue an order granting VOCA the requested relief.

WHEREFORE, Petitioner prays for the Commission to issue an order:

- a. ruling the sewer availability fees JACABB is charging to VOCA are unlawful;
- b. ruling JACABB has no right or authority to charge VOCA these sewer availability fees for the reasons set forth herein;
- c. ordering JACABB to immediately cease charging VOCA these sewer availability fees going forward;
- d. ruling that VOCA has no liability or obligation to pay sewer availability fees JACABB has billed to VOCA through the date of the Commission's ruling; and
- e. providing such other and further relief as the Commission deems just and proper.

Respectfully submitted,

ADAMS AND REESE LLP

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September 27, 2014
Columbia, South Carolina

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2014-_____ -S

IN RE:

JACABB Utilities, LLC Request for the)	
Approval of Amendment Number One to)	
Agreements between The Cliffs at Mountain)	CERTIFICATE OF SERVICE
Park, LLC and JACABB Utilities, LLC and)	
Village Overlook Condominium Association)	
and JACABB Utilities, LLC)	

This is to certify that I have caused to be served this day, one (1) copy of the *Complaint for Relief Against Improper Charges and Request for Declaratory, Exhibits 1-6 and this Certificate of Service* placing a copy of same in the care and custody of the United States Postal Service (unless otherwise specified), with proper first-class postage affixed hereto and addressed as follows:

VIA ELECTRONIC MAIL SERVICE AND FIRST CLASS MAIL SERVICE

Shannon Bowyer Hudson
Office of Regulatory Staff
Legal Department
1401 Main Street, Suite 900
Columbia SC 29201

s/ Linda B. Brewer
Linda B. Brewer/Paralegal

September 29, 2014
Columbia, South Carolina